

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCO J. VELASQUEZ,      }      Case No. CV 09-7112 JC  
Plaintiff,                      }  
v.                                }      MEMORANDUM OPINION AND  
MICHAEL J. ASTRUE,              }      ORDER OF REMAND  
Commissioner of Social        }  
Security,                        }  
Defendant.                      }

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**I. SUMMARY**

On October 5, 2009, plaintiff Francisco J. Velasquez (“plaintiff”) filed a Complaint seeking review of the Commissioner of Social Security’s denial of plaintiff’s application for benefits. The parties have consented to proceed before a United States Magistrate Judge.

This matter is before the Court on the parties’ cross motions for summary judgment, respectively (“Plaintiff’s Motion”) and (“Defendant’s Motion”). The Court has taken both motions under submission without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15; October 13, 2009 Case Management Order ¶ 5.

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1       Based on the record as a whole and the applicable law, the decision of the  
2 Commissioner is REVERSED AND REMANDED for further proceedings  
3 consistent with this Memorandum and Opinion and Order of Remand.

4       **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE  
5           DECISION**

6       On August 1 and August 7, 2006, respectively, plaintiff filed applications  
7 for Disability Insurance Benefits and Supplemental Security Income benefits.  
8 (Administrative Record (“AR”) 15, 95-99). Plaintiff asserted that he became  
9 disabled on July 19, 2001, due to disc problems in his back, surgery to his left  
10 shoulder, and leg pain. (AR 122). The Administrative Law Judge (“ALJ”)  
11 examined the medical record and heard testimony from plaintiff, who was  
12 represented by counsel, on July 8, 2008. (AR 24-51).

13       On September 2, 2008, the ALJ determined that plaintiff was not disabled  
14 through the date of the decision. (AR 15-23). Specifically, the ALJ found:  
15 (1) plaintiff suffered from a severe combination of impairments: “myofascial back  
16 pain with mild underlying degenerative changes; status post contusion of the left  
17 hand; mild diffuse osteoporosis, status post open rotator cuff repair of the left  
18 (minor) shoulder; degenerative joint changes of the left foot; and suspected mild  
19 atherosclerotic vascular disease below the knee level” (AR 18); (2) plaintiff’s  
20 impairments, considered singly or in combination, did not meet or medically equal  
21 a listed impairment (AR 18); (3) plaintiff retained the residual functional capacity  
22 to perform light work with certain limitations<sup>1</sup> (AR 18); (4) plaintiff could not  
23 perform his past relevant work (AR 21); (5) plaintiff could perform jobs that exist  
24 in significant numbers in the national economy (AR 21); and (6) plaintiff’s  
25 allegations regarding his limitations were not entirely credible. (AR 20-21).

26       The Appeals Council denied plaintiff’s application for review. (AR 1-3).

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28       <sup>1</sup>The ALJ found that plaintiff “may frequently bend, stoop, kneel, crawl and climb. He  
may also frequently reach above the shoulder with the left upper extremity. He is right hand  
dominant.” (AR 18).

1       **III. APPLICABLE LEGAL STANDARDS**

2       **A. Sequential Evaluation Process**

3       To qualify for disability benefits, a claimant must show that he is unable to  
4       engage in any substantial gainful activity by reason of a medically determinable  
5       physical or mental impairment which can be expected to result in death or which  
6       has lasted or can be expected to last for a continuous period of at least twelve  
7       months. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (citing 42 U.S.C.  
8       § 423(d)(1)(A)). The impairment must render the claimant incapable of  
9       performing the work he previously performed and incapable of performing any  
10       other substantial gainful employment that exists in the national economy. Tackett  
11       v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citing 42 U.S.C. § 423(d)(2)(A)).

12       In assessing whether a claimant is disabled, an ALJ is to follow a five-step  
13       sequential evaluation process:

- 14       (1)       Is the claimant presently engaged in substantial gainful activity? If  
15               so, the claimant is not disabled. If not, proceed to step two.
- 16       (2)       Is the claimant's alleged impairment sufficiently severe to limit  
17               his ability to work? If not, the claimant is not disabled. If so,  
18               proceed to step three.
- 19       (3)       Does the claimant's impairment, or combination of  
20               impairments, meet or equal an impairment listed in 20 C.F.R.  
21               Part 404, Subpart P, Appendix 1? If so, the claimant is  
22               disabled. If not, proceed to step four.
- 23       (4)       Does the claimant possess the residual functional capacity to  
24               perform his past relevant work? If so, the claimant is not  
25               disabled. If not, proceed to step five.
- 26       (5)       Does the claimant's residual functional capacity, when  
27               considered with the claimant's age, education, and work  
28               experience, allow him to adjust to other work that exists in

1 significant numbers in the national economy? If so, the  
 2 claimant is not disabled. If not, the claimant is disabled.

3 Stout v. Commissioner, Social Security Administration, 454 F.3d 1050, 1052 (9th  
 4 Cir. 2006) (citing 20 C.F.R. §§ 404.1520, 416.920). The claimant has the burden  
 5 of proof at steps one through four, and the Commissioner has the burden of proof  
 6 at step five. Bustamante v. Massanari, 262 F.3d 949, 953-54 (9th Cir. 2001)  
 7 (citing Tackett); see also Burch, 400 F.3d at 679 (claimant carries initial burden of  
 8 proving disability).

9 **B. Standard of Review**

10 Pursuant to 42 U.S.C. section 405(g), a court may set aside a denial of  
 11 benefits only if it is not supported by substantial evidence or if it is based on legal  
 12 error. Robbins v. Social Security Administration, 466 F.3d 880, 882 (9th Cir.  
 13 2006) (citing Flaten v. Secretary of Health & Human Services, 44 F.3d 1453, 1457  
 14 (9th Cir. 1995)). Substantial evidence is “such relevant evidence as a reasonable  
 15 mind might accept as adequate to support a conclusion.” Richardson v. Perales,  
 16 402 U.S. 389, 401 (1971) (citations and quotations omitted). It is more than a  
 17 mere scintilla but less than a preponderance. Robbins, 466 F.3d at 882 (citing  
 18 Young v. Sullivan, 911 F.2d 180, 183 (9th Cir. 1990)).

19 To determine whether substantial evidence supports a finding, a court must  
 20 “consider the record as a whole, weighing both evidence that supports and  
 21 evidence that detracts from the [Commissioner’s] conclusion.”” Aukland v.  
 22 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (quoting Penny v. Sullivan, 2 F.3d  
 23 953, 956 (9th Cir. 1993)). If the evidence can reasonably support either affirming  
 24 or reversing the ALJ’s conclusion, a court may not substitute its judgment for that  
 25 of the ALJ. Robbins, 466 F.3d at 882 (citing Flaten, 44 F.3d at 1457).

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1 **IV. DISCUSSION**

2 **A. The ALJ Improperly Assessed Plaintiff's Credibility.**

3 Plaintiff contends that the ALJ improperly evaluated the credibility of  
 4 plaintiff's subjective complaints. (Plaintiff's Motion at 18-23). The Court agrees.

5 **1. Pertinent Law**

6 "To determine whether a claimant's testimony regarding subjective pain or  
 7 symptoms is credible, an ALJ must engage in a two-step analysis." Lingenfelter v.  
 8 Atrue, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, "the ALJ must determine  
 9 whether the claimant has presented objective medical evidence of an underlying  
 10 impairment 'which could reasonably be expected to produce the pain or other  
 11 symptoms alleged.'" Id. (quoting Bunnell v. Sullivan, 947 F.2d 341, 344 (9th Cir.  
 12 1991) (en banc)).

13 "Second, if the claimant meets this first test, and there is no evidence of  
 14 malingering, 'the ALJ can reject the claimant's testimony about the severity of  
 15 [his] symptoms only by offering specific, clear and convincing reasons for doing  
 16 so.'" Lingenfelter, 504 F.3d at 1036 (citations omitted). "In making a credibility  
 17 determination, the ALJ 'must specifically identify what testimony is credible and  
 18 what testimony undermines the claimant's complaints.'" Greger v. Barnhart, 464  
 19 F.3d 968, 972 (9th Cir. 2006) (citation omitted). "The ALJ must cite the reasons  
 20 why the claimant's testimony is unpersuasive." Orn v. Astrue, 495 F.3d 625, 635  
 21 (9th Cir. 2007) (citation and quotation marks omitted). In weighing credibility,  
 22 the ALJ may consider factors including: the nature, location, onset, duration,  
 23 frequency, radiation, and intensity of any pain; precipitating and aggravating  
 24 factors (e.g., movement, activity, environmental conditions); type, dosage,  
 25 effectiveness, and adverse side effects of any pain medication; treatment, other  
 26 than medication, for relief of pain; functional restrictions; the claimant's daily  
 27 activities; and "ordinary techniques of credibility evaluation." Bunnell, 947 F.2d  
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1 at 346 (citing Social Security Ruling (“SSR”) 88-13;<sup>2</sup> quotation marks omitted).

2 The ALJ may consider (a) inconsistencies or discrepancies in a claimant’s  
3 statements; (b) inconsistencies between a claimant’s statements and activities;  
4 (c) exaggerated complaints; and (d) an unexplained failure to seek treatment.

5 Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002). If properly supported,  
6 the ALJ’s credibility determination is entitled to “great deference.” See Green v.  
7 Heckler, 803 F.2d 528, 532 (9th Cir. 1986).

## 8 2. Analysis

9 In this case, the ALJ found that plaintiff’s “medically determinable  
10 impairments could reasonably be expected to produce the alleged symptoms;  
11 however, [plaintiff’s] statements concerning the intensity, persistence and limiting  
12 effects of these symptoms are not credible to the extent they are inconsistent with  
13 the residual functional capacity assessment.” (AR 20). The ALJ provided several  
14 reasons for discounting plaintiff’s credibility. The Court finds none of them to be  
15 clear and convincing.

16 First, the ALJ stated that plaintiff’s “credibility is reduced by the lack of  
17 objective medical evidence to substantiate his claims.” (AR 20). An ALJ may  
18 consider lack of medical evidence supporting the degree of limitation, but it  
19 “cannot form the sole basis for discounting” subjective symptom testimony.  
20 Burch, 400 F.3d at 681. As discussed below, the ALJ provided no other valid  
21 reason for discounting plaintiff’s testimony. Thus, to the extent the ALJ correctly  
22 concluded that there was a lack of objective medical evidence to substantiate his  
23 claims, this reason does not alone suffice to discount plaintiff’s credibility.

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25 <sup>2</sup>Social Security rulings are binding on the Administration. See Terry v. Sullivan, 903  
26 F.2d 1273, 1275 n.1 (9th Cir. 1990). Such rulings reflect the official interpretation of the Social  
27 Security Administration and are entitled to some deference as long as they are consistent with the  
28 Social Security Act and regulations. Massachi v. Astrue, 486 F.3d 1149, 1152 n.6 (9th Cir.  
2007) (citing SSR 00-4p).

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2       Next, the ALJ stated that plaintiff “has had very little treatment – not of an  
3 amount, frequency, or intensity consistent with the alleged degree of impairment.”  
4 (AR 20). Though an ALJ may consider an unexplained failure to seek treatment in  
5 discounting a plaintiff’s credibility, here the ALJ did not explain why he  
6 considered plaintiff’s treatment inadequate. Plaintiff underwent surgery to repair a  
7 tear in his rotator cuff in 2002. (See AR 181-82). He has continued to complain  
8 of pain since then and has been prescribed pain medication and has had  
9 radiological studies of his left ankle, left foot, left shoulder, and lumbar spine.  
10 (AR 235-43, 247, 255, 256, 260-69, 271-72). On this record, the ALJ’s statement  
11 that plaintiff “has had very little treatment” does not clearly and convincingly  
12 discount plaintiff’s credibility.

13       The ALJ also found that plaintiff “has engaged in work since the alleged  
14 onset date” and stated that he may “consider whether this activity shows that  
15 [plaintiff’s] capacity is greater than alleged, and indicative of the capacity for  
16 substantial gainful activity, or at least an absence of credibility in [plaintiff’s]  
17 allegations.” (AR 20). Plaintiff testified that he has not performed any work  
18 activity since his disability onset date. (AR 35). His attorney explained that his  
19 earnings record at the Administration was incorrect because another individual  
20 had stolen plaintiff’s identity and had used his social security number for  
21 employment purposes. (AR 29-30). Plaintiff’s attorney noted that plaintiff had  
22 filed a police report documenting this identity theft and stated she would provide  
23 the ALJ with a copy of the report and related documents. (AR 29). The attorney  
24 stated that she faxed these documents to the ALJ on July 17, 2008, and received  
25 confirmation that the transmission was successful (Plaintiff’s Motion at 8), but the  
26 documents were not incorporated into the Administrative Record. The ALJ noted  
27 in his written decision that “there is no documentation that [plaintiff’s] identity  
28 was stolen.” (AR 20). Plaintiff has provided these documents as Exhibit A to his

1 motion for summary judgment. In light of this evidence, the ALJ should reassess  
2 at Step One whether plaintiff has performed substantial gainful activity since his  
3 alleged onset date, and this reason does not impugn plaintiff's credibility.

4 The ALJ next stated that plaintiff "has made contradictory statements  
5 regarding his alleged illiteracy of the English language." (AR 20). The ALJ noted  
6 that plaintiff wrote that "he could not read or write English and used an interpreter  
7 during the hearing," but plaintiff passed a citizenship exam in English. (AR 20  
8 (citing Ex. 2E [AR 121])). Although plaintiff was able to pass a citizenship exam  
9 in English, the record reflects that plaintiff experiences some difficulty with the  
10 English language. For example, a State agency worker noted that plaintiff "had a  
11 hard time understanding interview questions, representative had to help him."  
12 (AR 119). Records from Martin Luther King Medical Center state that plaintiff's  
13 primary language is Spanish and that he needs an interpreter. (AR 246, 253, 255,  
14 256, 260, 269). On this record, plaintiff's allegedly contradictory statements about  
15 his ability to understand English do not clearly and convincingly undermine his  
16 credibility.

17 Finally, the ALJ stated that plaintiff's "activities of daily living are not  
18 consistent with the alleged degree of pain and impairment." (AR 20). Although  
19 an ALJ may legitimately discount a claimant's credibility if his daily activities  
20 contradict his other testimony or demonstrate a capacity to engage in substantial  
21 gainful activity, see Orn, 495 F.3d at 639, here, the ALJ provided no specifics  
22 regarding which activities allegedly undermined plaintiff's statements regarding  
23 his degree of pain and impairment. This reason, too, fails to detract from  
24 plaintiff's credibility.

25 Remand is warranted for the ALJ to reassess plaintiff's credibility.

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1           **B. The ALJ Did Not Properly Evaluate the Medical Evidence.**

2           Plaintiff argues that the ALJ did not adequately evaluate the medical  
 3 evidence from several treating sources. (Plaintiff's Motion at 9-18). The Court  
 4 agrees.

5           **1. Pertinent Law**

6           In Social Security cases, courts employ a hierarchy of deference to medical  
 7 opinions depending on the nature of the services provided. Courts distinguish  
 8 among the opinions of three types of physicians: those who treat the claimant  
 9 ("treating physicians") and two categories of "nontreating physicians," namely  
 10 those who examine but do not treat the claimant ("examining physicians") and  
 11 those who neither examine nor treat the claimant ("nonexamining physicians").  
 12 Lester v. Chater, 81 F.3d 821, 830 (9th Cir.), as amended (1996) (footnote  
 13 reference omitted). A treating physician's opinion is entitled to more weight than  
 14 an examining physician's opinion, and an examining physician's opinion is  
 15 entitled to more weight than a nonexamining physician's opinion. See id. In  
 16 general, the opinion of a treating physician is entitled to greater weight than that of  
 17 a non-treating physician because a treating physician "is employed to cure and has  
 18 a greater opportunity to know and observe the patient as an individual." Morgan  
 19 v. Commissioner of Social Security Administration, 169 F.3d 595, 600 (9th Cir.  
 20 1999) (citing Sprague v. Bowen, 812 F.2d 1226, 1230 (9th Cir. 1987)).

21           A treating physician's opinion is not, however, necessarily conclusive as to  
 22 either a physical condition or the ultimate issue of disability. Magallanes v.  
 23 Bowen, 881 F.2d 747, 751 (9th Cir. 1989) (citing Rodriguez v. Bowen, 876 F.2d  
 24 759, 761-62 & n.7 (9th Cir. 1989)). Where a treating physician's opinion is not  
 25 contradicted by another doctor, it may be rejected only for clear and convincing  
 26 reasons. Orn, 495 F.3d at 632 (citation and internal quotations omitted). An ALJ  
 27 can reject the opinion of a treating physician in favor of a conflicting opinion of  
 28 another examining physician if the ALJ makes findings setting forth specific,

1 legitimate reasons for doing so that are based on substantial evidence in the  
 2 record. Id. (citation and internal quotations omitted). “The ALJ must do more  
 3 than offer his conclusions.” Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir.  
 4 1988). “He must set forth his own interpretations and explain why they, rather  
 5 than the [physician’s], are correct.” Id.; see Thomas v. Barnhart, 278 F.3d 947,  
 6 957 (9th Cir. 2002) (ALJ can meet burden by setting out detailed and thorough  
 7 summary of facts and conflicting clinical evidence, stating his interpretation  
 8 thereof, and making findings) (citations and quotations omitted). “Broad and  
 9 vague” reasons for rejecting a treating physician’s opinion do not suffice.

10 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir.1989).

11 When they are properly supported, the opinions of physicians other than  
 12 treating physicians, such as examining physicians and nonexamining medical  
 13 experts, may constitute substantial evidence upon which an ALJ may rely. See,  
 14 e.g., Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (consultative  
 15 examiner’s opinion on its own constituted substantial evidence, because it rested  
 16 on independent examination of claimant); Morgan, 169 F.3d at 600 (testifying  
 17 medical expert opinions may serve as substantial evidence when “they are  
 18 supported by other evidence in the record and are consistent with it”).

19 **2. Analysis**

20 Plaintiff first contends that the ALJ did not properly consider the opinion of  
 21 the treating physician involved in plaintiff’s worker’s compensation case, Dr.  
 22 Peter Lucero. (Plaintiff’s Motion at 9-15). The ALJ stated that “to the extent that  
 23 one can roughly interpret the significant differences between California workers’  
 24 compensation and Social Security terminology, in this case there appears to be  
 25 general agreement between my residual functional capacity assessment and that of  
 26 [Dr. Lucero] regarding [plaintiff’s] physical functional capacity.” (AR 19).  
 27 Despite making this statement, however, the ALJ did not incorporate Dr. Lucero’s  
 28 functional limitations into plaintiff’s residual functional capacity. Dr. Lucero

wrote that plaintiff should be restricted from “pushing, pulling, heavy lifting, work above shoulder level, repeated twisting, turning, forceful grasping and torquing.” (AR 187). The ALJ’s residual functional capacity does not include all of these limitations and in fact contradicts at least one of them – the ALJ stated that plaintiff may “frequently reach above the shoulder with the left upper extremity.” (AR 18). The ALJ did not provide any reasons (whether specific and legitimate or clear and convincing) for rejecting Dr. Lucero’s opinions. On remand, the ALJ must either accept Dr. Lucero’s opinions or provide valid reasons for rejecting them.

Plaintiff also argues that the ALJ failed adequately to assess his more recent treatment records from Martin Luther King Medical Center. (Plaintiff’s Motion at 15-18). The ALJ’s discussion of these records was cursory and incomplete. The ALJ stated only that “the treatment records consistently note that [plaintiff’s] conditions are mild or minimal” and “the progress notes . . . reflect that [plaintiff] denied any physical complaints of pain in January 2005; he only sought a review of his medications.” (AR 19) (citing Ex. 2F at 5 [AR 192], 13F at 3-6, 8, 10 [AR 234-37, 239, 241]). The ALJ did not mention the records from Martin Luther King Medical Center in Exhibits 14F or 15F [AR 244-73]. Among other things, these records indicate that plaintiff was diagnosed with diabetes mellitus with neuropathy and prescribed glyburide and Neurontin (AR 247-48, 251-52), and that plaintiff continued to complain of pain and was prescribed pain medication (AR 250, 255, 256, 260-62, 264-72). The ALJ’s failure to mention this evidence suggests an improper selective consideration of the medical evidence. See Edlund v. Massanari, 253 F.3d 1152, 1159 (9th Cir. 2001) (error for ALJ to “selectively focus[] on . . . [evidence] which tend[s] to suggest non-disability”); Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984) (error for ALJ to ignore or misstate competent evidence in order to justify his conclusion).

Remand is warranted for the ALJ to reevaluate the medical evidence.

1 **V. CONCLUSION**

2 For the foregoing reasons, the decision of the Commissioner of Social  
3 Security is reversed in part, and this matter is remanded for further administrative  
4 action consistent with this Opinion.<sup>3</sup>

5 LET JUDGMENT BE ENTERED ACCORDINGLY.

6 DATED: October 6, 2010

7 /s/

8 Honorable Jacqueline Chooljian  
9 UNITED STATES MAGISTRATE JUDGE

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25 <sup>3</sup>When a court reverses an administrative determination, “the proper course, except in rare  
circumstances, is to remand to the agency for additional investigation or explanation.”  
26 Immigration & Naturalization Service v. Ventura, 537 U.S. 12, 16 (2002) (citations and  
quotations omitted). Remand is proper where, as here, additional administrative proceedings  
27 could remedy the defects in the decision. McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
1989); see also Connell v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) (remand is an option  
28 where the ALJ stated invalid reasons for rejecting a claimant’s symptom testimony).